REPORT

OF THE

COMMITTEE ON THE JUDICIARY

UPON MARTIAL LAW.

The Committee on the Judiciary, having had under consideration several resolutions and bills, referred to them by the House, relating to martial law, respectfully report:

A few days after this Congress first assembled it enacted that "during the present invasion of the Confederate States, the President shall have power to suspend the privilege of the writ of *habeas corpus* in such cities, towns and military districts as shall, in his judgment, be in such danger of attack by the enemy as to require the declaration of martial law." This is the entire act of February 27, 1862. It either assumed that the President had authority, without the aid of legislation to declare martial law, or it was designed to confer that authority by very vague and imperfect legislation.

The President (who has used this power with exemplary moderation) proceeded to declare martial law in several places threatened with invasion, and it was soon discovered to have effects, as then administered, far beyond a mere suspension of the writ of *habeas corpus*. It was found, also, that the suspension of that writ by the act of Congress had been too general. To remedy the latter inconvenience and to limit the duration of martial law, another act was passed by Congress, on the 19th day of April, 1862, confining the suspension of the writ of *habeas corpus* "to arrests made by the authorities of the Confederate Government or for offences against the same," and limiting the duration of the former act to a period ending "thirty days after the next meeting of Congress," a period now about to expire.

Since the latter act was passed martial law has been declared in several districts by the President and by Generals commanding armies; but these declarations of the Generals have been annulled by the President as unauthorized. They have served to call the attention of Congress and the country anew to the subject of martial law. The vast extent of power assumed, in some of these instances, to have been conferred by military officers on themselves by a declaration of martial law, has challenged a more thorough investigation of the nature and foundation of martial law than may have been deemed practicable where, in a season of great public danger, Congress first legis-

lated on the subject. It was not then referred to a committee by the House.

Martial law was part of the ancient common law of England, but its pristine vigor has long since been paralyzed in that country by the progress of liberty. In the beginning it was the law administered in the courts held by the Lord High Constable or by the Earl Marshal of England and his subordinates the provost marshals and lieutenants of counties. The law itself was commonly described by reference to the jurisdiction of the court of the marshal. That jurisdiction embraced matters of war and chivalry and contracts made beyond sea concerning arms. Beyond these subjects the jurisdiction of the marshal's court was disputed, and, indeed, was forbidden by statute in the 13th year of the reign of Richard II.

The methods of procedure in these courts were summary, excluding the guarded modes of trial observed in the ordinary civil tribunals. In the adjudication of questions arising in the army they proceeded upon the axiom that the power of the King was absolute over the army in the field, and over the life of every person attached to the army in time of war. This power was not controlled by any law. The King (it is said) might put to death, at will, any soldier in the field. His commands were law to the army and to the courts of the marshals. Thus, in effect, absolute power, administered by military courts in summary proceedings, constituted martial law.

No authority to extend martial law over persons not connected with the army was incident to military command. But such authority was claimed to belong to the King, at least in times of war and insurrection, as one of his royal prerogatives for governing the nation, as a political no less than as a military power of the crown. But whether, according to the ancient common law, it was a prerogative of the King to cause martial law to be put in force in time of peace, even as to the army; or to extend it, at any time, over civilians; these and other questions of like nature were long and severely contested. Usually the pretensions and practices of arbitrary monarchs in turbulent times were in contrast with the unheeded opinions of courts and jurists. But it was generally admitted by those who condemned as well as those who invoked its exercise, that martial law, whenever and wherever it could lawfully prevail, had the effect to institute arbitrary power and the jurisdiction of courts martial.

During the reign of Charles I. the Parliament, by the Petition of Right, asserted the ancient liberties of the people of England, and, among other grievances, denounced the abuse of martial law; alleging that persons not connected with the army (in common with soldiers) had been tried by the course of martial law under commissions from the crown; and affirming that this was unlawful. After the long struggles which marked the 17th century, the Bill of Rights and the subsequent practice of Parliament placed the rights of the subject, in this regard, on still firmer and plainer ground.

Martial law, as applicable to the army, has been superseded in England and in this country by that which we now call military law—a system of regulations enacted by the legislature for the government

of the military forces. No other martial law is now known as applicable to the government of the army. No other is necessary, for, instead of the absolute will of a monarch, we have a system of rules carefully digested and matured by experience.

But the question remains whether martial law, which has been superseded in its principal and ordinary field of operation by modern military law, may be still put in force in its secondary and extraordinary application to citizens not in the army. If it can be, will it still have its ancient effect of instituting arbitrary power and the jurisdiction of courts martial wherever it is declared? If not, what are the limitations upon it? And, finally, by whom may it be declared?

That some things may still be lawfully done which were done three centuries ago under the name of martial law, cannot be denied. For example, the writ of *habeas corpus* can be suspended by Congress in certain exigencies by virtue of a clause in the Constitution. But to suspend that writ is not to establish martial law with its summary proceedings and absolute power. Although, when the writ is suspended the citizen may be restrained of his liberty, he can be tried and punished only according to the laws of the land.

A military commander may destroy a citizen's house when it becomes necessary for the safety of his army. In a proper case, the act would be in accordance with the Constitution and the laws, for they devolve upon the commander an authority and a duty which, in the case supposed, cannot be performed without destroying the house. The citizen then would have no recourse against the commander, but must look to the Government for indemnity. It is a familiar principle that when the law has conferred authority upon an officer to do any act, it carries equal authority to do whatever is necessarily incident to that act, notwithstanding he may happen to injure the property of another. But, in every case, he must show the authority of the law and the necessity of the occasion.

According to the same principle, a commander occupying a town may sometimes restrain the egress and ingress of citizens to the extent necessary for the safety of his army, or he may, for necessary cause, interrupt the pursuits of the citizens. He may (especially in a war like the present) exert many other unusual powers at or near the place occupied by his force. But if, by any such exercise of power a citizen be injured, the officer must justify the particular act causing the injury by showing that this very act was necessarily or properly incident to the authority and duty devolved on him by the laws.

Congress, also, by virtue of the powers conferred upon it by the Constitution—such, for example, as the powers to declare war and to raise armies—may authorize acts to be done which will incidentally injure a citizen or interfere with the exercise of his rights. But this is justified by a constitutional principle, and not by a suspension of the Constitution. Every such law must stand or fall alone, and be judged according to the constitutional standard.

All this, however, is very different from a power in a commander, or in the President, or in Congress to declare martial law, and then, by

virtue of martial law, to exercise arbitrary, absolute and unlimited power. According to the constitutional and legal principles which have been stated, the government can exact ample powers for the public defence, Congress may fulfil all its constitutional functions and a commander may perform all his lawful duties without danger to the public liberty or unnecessary injury to the citizen. But if Congress, or the President, or a military commander may first determine that martial law is necessary and having declared it, then exercise arbitrary, power over all persons and things within the district subject to martial law, every injury to private rights and public liberty will be justified by a stroke of the pen and by the aggressor. In a country governed by a written constitution and by certain laws this is simply impossible. It is impossible, therefore, that martial law in its ancient and customary sense can exist within the Confederate States. Neither in peace nor war can soldiers be subject to any martial law inconsistent with the regulations enacted by Congress in pursuance of the constitution, nor can citizens be subject to any power inconsistent with the constitution or laws.

But this may be conceded and yet it may be said that martial law in a modern and modified sense can be established. If this assertion leads only to a dispute about the meaning of words, it is insignificant. If it means that Congress can enact regulations for the government of the army and call them "martial law;" or can, by virtue of the constitution, enact laws conferring certain powers on the President and call them "martial law;" or that the President and military commanders may do those acts, which, in time of war, are necessarily incident to the duties devolved on them by the constitution and laws, and call this "martial law;" the assertion may be suffered to pass as unfit for contestation. If martial law can go no further than this, it leaves us to judge every law that may be passed by Congress, and every act that may be done by the President or a military officer, by standards which are well known and universally respected. But it is superfluous to declare martial law for the purpose of justifying that which is authorized already by the constitution and laws of the land. This, however, is not martial law, since no usage has attached such a sense to the phrase; but it is something else which may be arbitrarily styled martial law, with no effect but to make confusion and uncertainty.

If it be meant that a declaration of martial law has some other effect, not so broad as it had under the Tudors or yet so narrow as to keep strictly within the constitution and the laws of the land, it is wholly unintelligible. Nothing can be more repugnant to that certainty which, in the laws, is essential to the maintenance of right and of liberty. Whatever may be necessary in that sense should be plainly enacted. If the President or a military commander can set up a vague power not confined by law nor regulated by law, he may exalt the military above the civil authority to an unknown height.

But conceding for a moment, that in any sense martial law can be established, by whom can it be established? So far as it formerly related to the government of the army, the power to enact it is dis-

tinctly vested in Congress; for the constitution expressly grants Congress the power "to make rules for the government and regulation of the land and naval forces." So far as any authority existed to extend martial law over civilians, it pertained by the ancient common law in some degree to the king as one of his prerogatives for governing the nation. In modern times it is believed that whenever a necessity for declaring martial law over any district is apprehended in England, the parliament provides for the exigency by a statute carefully defining the powers to be exercised, and the mode of exercising them. Ever since the bill of rights, it has been settled in that country that the king could not declare martial law, and no kind of martial law has been tolerated except that which is authorized and regulated from time to time by the legislature.

Under our written constitution we cannot invoke the common law to determine what authority belongs to our government or what is the constitutional distribution of political power among its great departments. Although it may be true that at common law, the crown had authority in certain exigencies to subject the people to martial law as a branch of royal prerogative, it does not follow that either our Chief Executive Magistrate, or Congress, or our entire government inherits the same power. The President, indeed, is by the constitution "commander-in-chief of the army" and as such, he may exercise all authority necessarily incident to that office according to the laws. But his authority over the army is subject to the regulations enacted by Congress for its government, and his authority over the people, either as commander-in-chief or in any other capacity, is subject to the constitution and to the laws enacted by Congress in pursuance of the constitution. He can exert no power inconsistent with law, and, therefore, he cannot declare martial law except in an insignificant sense which, as before explained, neither adds to nor detracts from the force of the ordinary laws.

Since it has long been well settled that Congress alone can authorize a suspension of the writ of *habeas corpus*, it might have been inferred that the personal liberty of the citizen can never be invaded without legislative authority; and the truth seems axiomatic that the laws can be suspended only by the law making power. "All legislative powers herein delegated" says the constitution, "shall be vested in a Congress of the Confederate States." Congress is also "to make all laws which shall be necessary and proper for carrying into execution "all powers vested by the constitution "in any department or office" of the government, including the President. It follows that no law can exist by authority of the Confederate States, unless it be enacted by Congress. Either martial law is properly styled law or it is not; if it is, it can only be established or authorized by Congress; if it is not, it is lawless power and cannot exist in a government such as ours. The supremacy of law is the safeguard of liberty.

The Supreme Court of the late Union decided that a certain State legislature could, in time of insurrection, declare martial law; but it did not define martial law. In whatever sense it may be declared, the power to establish or authorize it seems to belong exclusively to

the legislature, whether of a State or of the Confederate States. The exigencies for which it is designed, the considerations which determine its propriety and the results to which it tends are political as often as military, and they should be submitted to legislative discretion. We need not now inquire whether any State legislature has other powers in this regard than Congress or the Confederate government.

When our forces occupy an enemy's country, the people of that country are not shielded against military authority by our constitution or laws. The commanders or the President as commander-in-chief, being intrusted with an army for the very purpose of injuring the enemy and being unrestrained with respect to the enemy's people by any law (except, of course, international law), may exercise unlimited authority over them. Since, in such circumstances we cannot administer any other law, it is inevitable that under the name of martial law or otherwise, the will of the commander shall stand for law to the inhabitants under his military power.

But as to our own citizens and within our own country, no authority in the name of the Confederate government ought to be tolerated, except that which is regulated by the constitution and laws. If martial law over the people be necessary in any case it should be regulated and defined in a sense consistent with the constitution by distinct enactments. But since the phrase "martial law" is, at best, ambiguous and since, by reference to ancient usage, it may convey ideas dangerous to liberty, it is wiser in our legislation to substitute for it such positive regulations as may be deemed necessary.

The committee therefore recommend that the act of February 27, 1862, be suffered to expire, and that a bill and resolutions herewith presented be adopted.

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